No. 2928

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

F. T. MEYER
PLAINTIFF IN ERROR

VS.

THE PACIFIC MACHINERY COMPANY,
a Corporation
DEFENDANT IN ERROR

Brief on Behalf of Plaintiff in Error

UPON WRIT OF ERROR
TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

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F. T. MEYER,
Plaintiff in Error,

vs.

THE PACIFIC MACHINERY COMPANY,
a Corporation,
Defendant in Error.

Brief on Behalf of Plaintiff in Error

Upon Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court of the United States for the District of Oregon in favor of the Defendant in Error for the possession of personal property described in the Complaint, or if possession cannot be had, for the sum of $4243.50 and costs. (Page 32, Transcript of Record.) The action is in replevin and the claim of plaintiff (Defendant in Error) is set out on pages 5, 6, 7, Transcript of Record. After the formal parts of the Complaint, plaintiff says:

III.

"That the plaintiff now is, and at all times herein mentioned has been, the owner of and lawfully entitled to the possession of all of that certain personal property situate, lying and being in the mill formerly occupied and operated by the Oregon City Lumber Company at Oregon City, in Clackamas County, State of Oregon; and which machinery is more particularly described and itemized in the schedule hereto annexed and marked Exhibit "A," and made a part of this complaint."

IV.

"That on or about April 29th, 1909, plaintiff delivered said personal property to The Oregon City Lumber and Manufacturing Company, a corporation, *under a certain contract or letter in writing*, accepted by said The Oregon City Lumber and Manufacturing Company, by the terms of which contract the title to said personal property remained in the plaintiff until the full performance of the terms and conditions of said contract to be performed by The Oregon City Lumber and Manufacturing Company and the payment of the amount of the purchase price thereof, and that in case said The Oregon City Lumber and Manufacturing Company failed to perform the terms and conditions of said contract, or failed to make the payments provided to be made by said The Oregon City Lumber and Manufacturing Company, said contract

should become void at the election of the plaintiff, and said property immediately returned to the plaintiff."

V.

"That The Oregon City Lumber and Manufacturing Company failed to perform the terms and conditions of said contract, and failed to pay to the plaintiff the purchase price provided for therein, or any part thereof; *that the plaintiff has elected to declare said contract void and has given notice* thereof to The Oregon City Lumber and Manufacturing Company; that The Oregon City Lumber and Manufacturing Company on or about November 10th, 1909, made an assignment for the benefit of creditors to John J. Cooke and John W. Moffitt; that said John J. Cooke and John W. Moffitt, as assignees of said company, on April 20, 1911, assumed to sell all of the property of said company, including the property above described, to the defendant, F. T. Meyer, and placed said defendant in possession thereof; that said defendant was informed, and had notice that said contract between the plaintiff and The Oregon City Lumber and Manufacturing Company had been declared void, and had notice and was informed that the plaintiff was the owner of said property."

These allegations are all denied by defendant (Plaintiff in Error) and a separate answer and defense is set up, as follows (pages 18, 19, 20 and 21, Transcript of Record):

VI.

"And this defendant for a further and separate answer and defense herein, alleges:

"That on or about the 10th day of November, 1909, the Oregon City Lumber & Manufacturing Company was a corporation, organized and existing under the laws of the State of Oregon, and was the legal owner and in possession in Clackamas County, Oregon, of all the property mentioned in Plaintiff's Amended Complaint; that on said 10th day of November, 1909, said corporation being in failing circumstances, made an assignment for the benefit of all its creditors to John J. Cooke and John W. Moffitt and executed in due form of law a deed of general assignment under the laws of the State of Oregon, which deed was executed and acknowledged so as to entitle it to be recorded, and was duly recorded in Book 3, page 205, Record of Deeds for Clackamas County, Oregon, where said property was situated; that said assignees duly qualified as such and accepted said trust and immediately went into possession of all said property."

"That on or about the 21st day of April, 1911, said John J. Cooke and said John W. Moffitt, as such Assignees, in accordance with law duly sold all said property at public auction to the highest and best bidder for cash in United States Gold Coin; that prior to said sale, said sale was duly advertised according to law and plaintiff had due notice of said sale and of the time and place when the

same was to take place, and the terms thereof, and was represented at said sale by E. I. Garrett, its General Agent and Manager."

"That at said sale this defendant bid in the said property and the whole thereof and became the purchaser of all said property and the same was delivered to him by said John J. Cooke and said John W. Moffitt and defendant went into possession thereof at once and defendant has ever since remained and now is in possession of the same."

"That at said sale the said plaintiff was present by its General Agent and Manager, E. I. Garrett, and made no objection to said sale and made no claim to said property, or any part thereof, and consented to said sale."

"That at such sale this defendant was the highest and best bidder and bought said property at public auction in good faith and for full value."

"That neither said John J. Cooke nor John W. Moffitt nor this defendant ever had any notice or knowledge that there was any actual or pretended defect in the title to said property, or that plaintiff claimed that it had any interest in said property except as a general unsecured creditor of said Oregon City Lumber & Manufacturing Company, and this defendant alleges that he was on said April 21st, 1911, ever since has been and now is a bona fide purchaser in good faith for full value of all said property."

"And this defendant alleges that plaintiff by reason of its participation in said sale and because it

stood by and permitted this defendant to purchase the same at said sale in the manner and under the conditions hereinabove alleged, is and of right ought to be forever estopped to set up any claim or title to said property, or any part thereof as against this defendant, and particularly the claim set out in Plaintiff's Amended Complaint."

"And this defendant further alleges that when said personal property was sold by plaintiff on said 29th day of April, 1909, it was sold for the purpose of being used in a lumber and planing mill, and plaintiff had actual knowledge that it would be used for that purpose. That upon its being delivered on said April 29th, 1909, to said Oregon City Lumber & Manufacturing Company, it was immediately, with plaintiff's knowledge, used for the purpose above set out, and a large portion of it became attached to and a part of the realty of said mill and became a fixture that could not thereafter be removed, and defendant alleges that the said personal property was attached and is a part of the realty and not subject to replevin."

Upon the issues thus presented the case was tried by the Court without a jury, resulting in the judgment for plaintiff as above set out.

The Plaintiff in Error assigns the following errors relied upon as provided by Subdivision "b," Rule 24 of this Court:

I.

The District Court of the United States for the District of Oregon erred in refusing to find that the personal property to recover the possession of which this action was brought was sold to the Oregon City Lumber & Manufacturing Company for the purpose of having the same installed in and to become a part of a mill then in course of remodeling by said Oregon City Lumber & Manufacturing Company, and in refusing to find that the plaintiff had full knowledge at the time of such sale of the purpose for which said machinery was purchased and would be used.

II.

The said Court erred in refusing to find that said personal property became a part of the said mill owned by said Oregon City Lumber & Manufacturing Company and still remains attached to and a part of said mill.

III.

The said Court erred in deciding that said personal property was a subject of replevin and in not finding that when said property became affixed to said mill building it became a part of the realty and no longer subject to replevin.

IV.

The said Court erred in deciding that the said sale of said personal property to the Oregon City

Lumber & Manufacturing Company was a conditional sale, and in refusing to find that the same was an absolute sale and vested complete title to said personal property in the Oregon City Lumber & Manufacturing Company.

V.

The said Court erred in refusing to find that no memorandum of the sale of said personal property, stating the terms of said sale or any description of said personal property or signed by the vendor or vendee, nor any memorandum whatever was ever filed in the County Clerk's office or Recorder's office of the County of Clackamas, State of Oregon, at any time.

VI.

The said Court erred in refusing to find that, although the sale of said property might have been intended by the plaintiff to have constituted a conditional sale, retaining title to the property in plaintiff, yet by the provision of Section 7414, Lord's Oregon Laws, plaintiff not having filed any memorandum of said sale as required by that section, the condition became void, and the title vested absolutely in the Oregon City Lumber & Manufacturing Company.

VII.

The said Court erred in refusing to find that on the 21st day of April, 1911, after having given due

notice as provided by statute, the assignee of the Oregon City Lumber & Manufacturing Company duly and regularly sold all of said personal property to the defendant in this suit, and delivered possession thereof to said defendant; and in refusing to find that the plaintiff herein had actual notice thereof and was present at the time of said sale and made no objection thereto.

VIII.

The said Court erred in refusing to find that the plaintiff, by permitting said sale and by being present at said sale and not objecting thereto, must be held to have waived any rights which it might have had and is now estopped to assert such or any rights in opposition to the title of the defendant to said property.

IX.

The said Court erred in awarding and entering judgment in favor of the plaintiff and against the defendant for the possession of said property, or the value thereof, and in not awarding and entering judgment in favor of the defendant for his costs and disbursements.

X.

The said Court erred in overruling defendant's objection to the questions asked the witness Edward I. Garrett as to the significance of the phrase "machinery contract," as used by the trade, and allow-

ing said witness to answer: "It is a general term that is commonly used in the sale of machinery, whereby the vendor intends to retain title until the machinery is paid for," and said Court erred in overruling defendant's objection to the question asked said witness: "How does it compare with the phrase 'conditional sale'?", and in allowing said witness to answer: "Synonymous." (See Bill of Exceptions, pages 2 and 3.)

BRIEF OF ARGUMENT

I.

Conditional sales intended as security in lieu of a mortgage are not favored, as against creditors and vendees.

Houser & Haines Mfg. Co. v. Hargrove, 61 Pac. (Cal.) 660.

Stockton Savings & Loan Soc. v. Purvis, 112 Cal. 241; 44 Pac. 561.

II.

Where a contract for the conditional sale of personal property has been broken by the vendee, the seller may have a choice of one of four distinct remedies, among which he may waive a return of the property, treat the contract as executed on his part, and recover from the buyer the agreed price.

Herring-Marvin Co. v. Smith, 43 Ore. 315, 321.

Thienes v. Francis, 69 Ore. 171, 178.

III.

Plaintiff in Error contends that the proof shows that the sale was absolute, and the claim that it was conditional was purely an afterthought on the part of Defendant in Error. And, furthermore, even if the sale was conditional, Defendant in Error waived its right to retake the property:

1st. By claiming a lien on the same for the purchase price (pp. 67-68 Tr., Plaintiff's Ex. B) and by filing a bill in equity in the District Court of the United States for the District of Oregon, by which it sought to establish an equitable lien upon said property (Tr. pp. 178-197, Judgment Roll No. 5205, The Pacific Machinery Co. v. Oregon City Lumber Co., *et al.*)

The assertion of a lien upon property is inconsistent with the existence of title in the one asserting it, is an unequivocal act on his part to treat the property as that of another, and a waiver and abandonment of the title reserved on the sale.

Van Winkle v. Crowell, 146 U. S. 42, 50.

Hickman v. Richburg, 26 So. 136; 122 Ala. 638.

Whitney v. Abbott, 77 N. E. 524; 191 Mass. 59.

Richards v. Schreiber, 67 N. W. 569, 572; 98 Ia. 422.

On the same principle, an action for the purchase price of property sold under conditional sale contract, waives the right to the title.

Butler v. Dodson & Son, 94 S. W. 703, 704; 78 Ark. 569.
Frisch v. Wells, 200 Mass. 429; 86 N. E. 775; 23 L. R. A. (N. S.) 144. Note.
Smith v. Barber, 53 N. E. (Ind.) 1014, 1016.

2nd. The stipulation in the letter of April 29, 1909 (Tr., p. 34, Plaintiff's Ex. "A"), for $1500 cash payment on arrival of the machinery was waived by accepting $100 and failing to demand the rest upon delivery, and by failing to demand the return of the property when the balance was not paid.

Ewing v. Sylvester, 94 S. W. (Tex.) 405.
Parker v. Baxter, 86 N. Y. 586.
Scudder v. Bradbury, 106 Mass. 422, 427.
Scharff v. Meyer, 133 Mo. 428; 34 S. W. 858.

In Johnson v. Iankovetz, 110 Pac. 399, relied on by Defendant in Error upon the argument below, an action of replevin to recover two guns from an innocent purchaser, the Court says, speaking of a sale conditional upon cash payment:

> "If the price is not paid at the time of the delivery of the goods, the vendor may *immediately* reclaim them";

and further,

> "Some authorities hold that, in case of an innocent purchaser from the vendee, waiver

will be more readily inferred from delivery, if there is no express reservation of title."

IV.

The Oregon City Lumber & Manufacturing Co., the vendee, made an assignment of all its property for the benefit of creditors (Defendant's Ex. 8, Tr. pp. 176-178); the Assignees sold the property, including the machinery sued for, to the Plaintiff in Error; Defendant in Error, with full knowledge of all the facts—of the insolvency of the Lumber Company—of the assignment for the benefit of creditors—of the advertisement of all this and other property for sale to satisfy in so far as it might the claims of *all* creditors—of the postponement of the sale to accommodate the Machinery Company—of the final fixing of the date for April 20th, 1911—having sent its Treasurer from San Francisco for the purpose of attending the sale—made no effort to replevin this property or to prevent the sale or notify intending purchasers of any defect in the title—and is thereby estopped to claim it now. (See Tr. pp. 114-115, 117-118, 121-126.)

> A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

11 A. & E. Ency. (2nd Ed.), p. 429.
Thompson v. Blanchard, 4 N. Y. 303, 309.

Gregg v. Wells, 10 Adolph & Ellis, 90.
Deneger v. Sonser, 6 Wend. 436.

V.

The machinery was attached to the real estate so as to become a fixture thereto (Tr., pp. 88-89); no memorandum of the sale was ever recorded in the office of the Recorder or County Clerk; and the condition reserving title, if any existed, was therefore void as to purchasers.

Section 7414, Lord's Oregon Laws.
Chilberg v. Smith, 174 Fed. 805, 808.

VI.

Usage can be proved only by the testimony of at least two competent witnesses.

Section 801, Lord's Oregon Laws.

VII.

Opposing authorities distinguished:

We desire in this place to refer to two authorities relied on by Defendant in Error below, and cited in the opinion of the District Court, printed at page 25 of the Transcript.

Lundberg v. Kitsap County Bank, 139 Pac. 769.

The right of plaintiff in this case to obtain a judgment against the bank for an amount due under

its note and mortgage on certain mill property depended upon whether or not the sale of the property by one Cordz to Johnson & Lundberg was conditional or absolute. The contract of sale was in writing and was held, with other circumstances in the case, to evidence a conditional sale, and the defendant prevailed.

In the following particulars the case is manifestly to be distinguished from the case at bar:

1st. The writing which provided for cash payment and notes contained this clause:

> "And in case of failure of the said Johnson & Lundberg to make any of the above payments, *they shall forfeit payments already made by them, and if a dry kiln is built, it also shall be forfeited to me.*"

2nd. Cordz, the vendor, regarded it as a conditional sales contract, assigning it as such to the bank.

3rd. Everybody else, who had anything to do with it regarded it as a conditional sales contract, except Lundberg, the plaintiff, who claimed under a mortgage on the property sold.

Landigan v. Mayer, 51 Pac. (Ore.) 649.

Cited in the opinion (Tr., p. 30), to the proposition that "the manner in which the machinery was attached to the mill frame excludes the notion that it became part of the realty." But we call atten-

tion to the fact that Plaintiff in Error purchased the realty, and the opinion in this case (written by Judge Wolverton when a member of the Supreme Court) proceeds:

> "A purchaser, however, of the realty to which such property has become so annexed for value and without notice or knowledge of the distinctive character cast upon it by the agreement, will take it as a part and parcel of the realty, and his title will prevail as against those claiming under the agreement. (Citing Muir v. Jones, 23 Or. 332; Forrest v. Nelson, 108 Pa. St. 48.)"

Meyer purchased the realty together with the machinery.

A lease carrying the right to possession, with the lessee in possession, must be construed as realty within the meaning of Section 7414, L. O. L.

ARGUMENT

The history of the case as disclosed by the evidence is as follows:

Prior to April 29, 1909, probably a month prior, the Oregon City Lumber & Manufacturing Company had determined to increase the capacity of their mill at Oregon City, and were in need of additional machinery. They prepared a plan and specifications of what machinery they wanted and submitted the same to various machinery houses for figures,

and among the rest, to the Pacific Machinery Company. Upon the receipt of replies from the different houses, the bid of the Pacific Machinery Company was the lowest, or at least the most desirable, and Mr. Wm. G. Bohn, President of the Oregon City Lumber & Manufacturing Company, came to Portland to take up with the Manager of the Pacific Machinery Company the details of the contemplated contract with that company for furnishing the machinery.

On April 29, 1909, the parties met in Portland, at which meeting the following offer and acceptance was agreed upon (p. 34, Transcript of Record):

"Portland, Oregon, April 29, 1909.

Oregon City Lumber & Mfg. Co.,

Oregon City, Oregon.

Gentlemen:

We propose to furnish you machinery in accordance with attached specifications for the sum of $4695.00, including a 11x14 Beck type enginee feed, which is not mentioned in the specifications, delivery to be made at Portland. Terms to be $1500.00 cash on arrival of the machinery, balance to be paid in equal payments of two, three, four and five months dating from shipment of machinery. Transaction to be covered by machinery contract, with notes on deferred payments bearing interest at 8%, notes

to be endorsed by the company as well as by your Mr. Bohn and Mr. Collins, personally.

Yours truly,

PACIFIC MACHINERY COMPANY,

Accepted: Thos. Garrett, Mgr.

Oregon City Lumber & Manfg. Co.

By Wm. G. Bohn, Prest.

George W. Collins."

$100.00 cash was paid at the time of the signing of this paper (p. 74, Transcript of Record). How soon after this was signed delivery began does not appear. Garrett, who had the matter in charge, does not remember and has no record of the first shipment (p. 48, Transcript), and Bohn says they were very dilatory and delayed the Lumber Company a great deal (pp. 73 and 78, Transcript). However, plaintiff (Defendant in Error) did begin delivery and by July 23 had delivered, according to their opinion, apparently all of what was described in the specifications. *Up to this time plaintiff never made any demand for moneys and never asked to have a conditional sales contract signed.* On July 23, or a few days after that (Bohn, p. 75, Transcript), plaintiff presented to the Lumber Company the following statement of account (Transcript, page 142, Defendant's Exhibit 3):

"Defendant's Exhibit 3.

Portland, Ore., July 23rd, 1909.

Oregon City Lumber & Manfg. Co.,
Oregon City.

Pacific Machinery Co.
49 First Street.
Dealers in all kinds of
Machinery and Mill Supplies.

Interest at 10% per annum charged on all Past Due Accounts.

To Balance—

Contract	$4695.00
Sheets 10-16-17-19-23, &c.	1115.00
Add'l Charge bit auto trimmer and complete set Iron Works	350.00
Bill herewith for steel pulleys, boxes, collars, &c. ...	168.54
	$6328.54

On May 5th, 1909, we received $100.00. Deduct this amount from $2035.54 that is due upon execution of this contract. In other words, get a check for $1935.54 and the notes signed, also contract."

Accompanying this was an executory contract (Defendant's Exhibit 4, pages 142-145, Transcript). When this was presented to the Lumber Company for signature the Lumber Company refused to sign it. What then occurred is described by Bohn and

his testimony is undisputed. On direct examination Bohn says (pages 76-77-78 of the Transcript):

"Q. Now, Mr. Bohn, who brought you that paper, or how did you get it—the one you now hold in your hand?

A. Why, I am not certain, but I think that Mr. Garrett must have given it to us.

Q. This one that is in court?

A. Yes, sir, I think so.

Q. Or the other one?

A. No, this one here. I never saw the other one.

Q. Thomas Garrett?

A. I don't believe I ever saw the other Garrett; don't know him.

Q. You think Mr. Thomas Garrett? Somebody gave it to you, anyway?

A. Yes, sir.

Q. That was what date?

A. This is July 23rd.

Q. 1909. Up to that time had anybody ever said anything at all to you about a conditional bill of sale?

A. No.

Q. Did you agree to take a conditional bill of sale?

A. No, sir.

Q. When this was presented to you, what did you say about it?

A. Why, I just simply refused to exeecute it. That is all.

Q. You told him that was not the contract?

A. I didn't execute it. We didn't execute it.

Q. And then what happened about it?

A. Why, the next thing I know, Mr. Bronson here, I think, called on us and asked for a settlement of the account.

Q. When was that?

A. Oh, that was long after this. I don't know how long. But it was some time after that, anyway.

Q. Do you remember when the concern went into insolvency, when there was an assignment?

A. No, I don't know those dates. I haven't them in my mind. I objected to the payment of this account, because I thought we were entitled to a discount for delay in shipping, along with changes and other things.

Q. Well, you say you objected to the payment of the account?

A. Yes, sir.

Q. You considered, then, that you had made a contract whereby you owed this money if they had complied with their contract?

Q. What do you mean when you say you thought you were entitled to a rebate?

A. Will you repeat that?

Q. What do you mean when you say that you thought you were entitled to a rebate on that account?

A. Why, they delayed us in the shipment of that machinery, we thought, beyond all reason, and it was just at a critical time in the organization and starting of that business, and not getting this machinery embarrassed it very much at that time, and we thought we were entitled to a discount in their bill, and made a demand on them for a discount.

Q. That is, for a discount on the amount which you understood was owing?

A. Yes, sir.

Q. Now, I will ask you again, Mr. Bohn. did you at that time or at any time ever agree with these people to take a conditional bill of sale for that property?

A. I did not.

Q. You understood it to be an absolute sale?

A. Yes, sir."

On cross-examination, he says (page 83-84, Transcript):

"Q. What reason did you give, Mr. Bohn, when that conditional sale contract was presented to you for not signing it, do you know?

A. *I just simply repudiated the whole thing. It wasn't according to my understanding of the trade and transaction.*

Q. You had the machinery then, most of it, didn't you?

A. Why, they were shipping it. I don't think it was all delivered at that time.

Q. And there was then some payment due on it—$1500 or $2000 payment—wasn't there?

A. Well, according to that agreement there, I presume there was $1500 that was coming to them when the machinery was delivered.

Q. And the notes were then to be signed?

A. When the stuff was delivered.

Q. And it was to covered by a machinery contract?

A. No.

Q. That is what it says here, isn't it?

A. No. Well, it says 'machinery contract,' the contract to be signed. No conditional contract.

Q. Where is that instrument you had here awhile ago, that you said was presented to you?

Q. It was the machinery contract, or the form of machinery contract referred to, wasn't it?

A. Not according to my understanding."

When Bohn's examination, direct and cross, was concluded, he was examined by the Court, as follows (pages 86-87, Transcript):

"Examination by the Court.

Q. Mr. Bohn, when you signed that original contract or letter there, it purports to be a letter containing the words 'Transaction to be covered by machinery contract.' Did you un-

derstand that that condition was in there when you signed the letter?

A. You mean the 'machinery contract'?

Q. Yes.

A. The letter was complete there as we signed it.

Q. You understand, of course, that that condition was in the contract there?

A. Not a conditional sale, no, sir.

Q. Well, what did you understand a machinery contract was?

A. Why, I supposed it was the machinery—that they were going to make a contract based on their proposition to furnish that machinery.

Q. *But not a contract with conditional terms?*

A. *No, sir, I didn't have any idea of that kind at all.*

Q. *Was there any form of contract produced for your inspection at that time?*

A. *No, sir, there was not.*

Q. *They didn't tell you what their form of contract was?*

A. *No, sir.*

Q. *Did you know anything about their forms of contract that they use generally?*

A. *I did not. I did not, no, sir.*

Q. (Cross.) *Didn't Mr. Garrett tell you that they would furnish this only with reservation of title in themselves?*

A. *No.*"

When Bohn, representing the Lumber Company, repudiated the offered contract and declared to plaintiff (Defendant in Error) it was not the contract of his company and he would not sign it, the plaintiff made no claim for the property and asserted no right to have it returned. On the contrary, plaintiff company tacitly acquiesced in the claim of the Lumber Company and continued furnishing more machinery after the positive declaration of Bohn, representing the Lumber Company, that there was no conditional sales contract. See:

Defendant's Exhibit 6, page 167, June 10, 1909, amount $52.08
Defendant's Exhibit 6, page 167, June 15, 1909, amount ..... .60
Defendant's Exhibit 6, page 169, June 24, 1909, amount 12.00
Defendant's Exhibit 6, page 169, June 24, 1909, amount 90.13
Defendant's Exhibit 6, page 170, June 25, 1909, amount 96.07
Defendant's Exhibit 6, page 171, July 2, 1909, amount 6.34
Defendant's Exhibit 6, page 172, July 17, 1909, amount 15.55
Defendant's Exhibit 6, page 173, July 22, 1909, amount 3.32
Defendant's Exhibit 6, page 173, July 29, 1909, amount 9.56

Defendant's Exhibit 6, page 174, Aug. 6, 1909, amount 21.30
Defendant's Exhibit 6, page 175, Aug. 31, 1909, amount 18.75
Defendant's Exhibit 6, pages 175-6, Sept. 9, 1909, amount 45.00

A comparison of these items with Exhibit "A" of the complaint (pages 8 to 17 of Transcript) will show that practically all of them are included in Exhibit "A," and these various bills show that they were the ordinary memos of sales used in every business where a sale of goods is absolute. They all bear the statement "Sold to" and the warning, "No goods to be returned without first getting permission. Claims for shortage must be made within ten days from date of invoice." The continuation of these shipments, after the Lumber Company had repudiated the pretense that the sale was conditional only, is a ratification of the claim of the Lumber Company and excludes the idea that the transaction was anything but an ordinary absolute sale.

Nor is this all. The Lumber Company, after receiving and installing this machinery, was in business until October 28, 1909, when it failed and executed an assignment under the Oregon law providing for assignments for the benefit of creditors (pages 176-177-178, Transcript). The assignment was recorded as provided by law, in the office of the Recorder for Clackamas County, October 29, 1909,

and was notice to everybody. The assignment specifies this property: "Also all of that certain mill property, including all building and machinery, situate on the property." But even if it did not, the statute governs the case. (Volume 3, L. O. L., Sections 7540-7555.)

The plaintiff (Defendant in Error) knew all about this assignment and its effect under the law and made no claim for the delivery of this property or any of it. At this time the Machinery Company claimed, not the *title*, but some sort of a *lien* on it.

On November 13, 1909, we find their attorney, Mr. Bronson, writing to George W. Bohn, who in the reorganization effort was representing the Oregon City Lumber & Manufacturing Company, a letter containing this statement (pages 67-68, Transcript):

> *"I may say in this last connection that our position with reference to our being entitled to a lien upon the machinery which we put in the mill is based upon the theory that the refusal of the mill company to give us a machinery contract such as we could file under the registry law will not be held by the courts to deprive us of the security which we would undoubtedly have lost had we failed to file such conditional sale through our own laches.* We do not think that at the present time there is any necessity for starting into litigation over this question

and we are perfectly content to give the concern every opportunity to get on its feet by an extension."

No assertion here of *title*. An equitable *lien* is hinted at and this excludes the idea of *title*. One cannot have a *lien* on his own property. At this time there was an effort made to reorganize the Lumber Company, as shown by Bohn's letter of February 8th, 1910 (p. 69, Transcript), but nothing came of it, excepting signing the agreement (Defendant's Exhibit 2, pages 137-141 of Transcript) December 6, 1909. This is signed "Pacific Machinery Company by Ira Bronson, approx. $5724.86." It is to be noted that those signing the proposition of reorganization as above—Pacific Machinery Company—are denominated "*creditors of said company*" (page 137, Transcript).

The assignees remained in possession of the property until April 20, 1911, when it was sold in accordance with the procedure provided by the Oregon law for the sale of property by assignees for the benefit of creditors. Up to the time of that sale and for a long time afterwards Defendant in Error never pretended that it had *title* to this property or any right to replevin it.

On the 28th of September, 1911, in the Circuit Court (now District Court) of the United States for the District of Oregon and the same Court this action was started in, the Defendant in Error, as plaintiff filed a bill in equity against the Oregon

City Lumber & Manufacturing Company, John W. Moffitt and John J. Cooke, as Assignees of the Oregon City Lumber & Manufacturing Company, and F. T. Meyer (this Plaintiff in Error) upon this very account. In that case the plaintiff (Pacific Machinery Company), after reciting all the facts involved here, stated its claim thus: "IV. That on account and by reason of the above facts your complainant has during all the times herein mentioned claimed an equitable lien upon said property." And in that suit the plaintiff (Defendant in Error here) prayed for a decree that "Defendant F. T. Meyer holds said property as trustee for this plaintiff."

It is very clear, therefore, that up to that time, September 28th, 1911, this idea of a conditional bill of sale, title remaining in the vendor, had not taken form in the mind of the Pacific Machinery Company. Its officers and representatives had the idea that in some way they were entitled to and ought to have a *lien* upon the property to secure its purchase price, but they never pretended that the *title* had not passed. While it is true that in a sale providing for a cash payment at the time of delivery the vendor may insist upon payment before delivery, or if delivery has been made with the idea that delivery and payment are to be concurrent acts and payment is neglected, the vendor may retake the property, yet this privilege must be exercised at once. It is a privilege and may be waived by the vendor, and if it ever existed at all in this case, which we deny, it certainly was waived.

On July 23, 1909, the Oregon City Lumber & Manufacturing Company rejected the Machinery Company's claim and refused to either sign the notes or make the payments demanded by the Machinery Company. If the Machinery Company had then asserted its right to recover the possession of the property it would at least be acting in accordance with what it now claims to have been its understanding of the situation. But it did not do so. It ratified by acquiescence the claim of the Lumber Company and permitted the property to remain attached to the mill and to be used by the Lumber Company until its final disposition through the assignees to this Plaintiff in Error. It appears by the testimony of C. D. Latourette (page 123, Transcript) that the final sale of the property which took place April 20th, 1911, was as a matter of fact continued to that date in order to accommodate the Pacific Machinery Company and at its request. The Pacific Machinery Company and its officers knew all about the sale, and by not objecting consented to it. (Testimony of C. D. Latourette, 123-124, Transcript):

> "Q. Had you as attorney for the bank or as attorney for the receiver, or in any capacity, or at all, ever been informed up to that time that the Pacific Machinery Company claimed any title to that property?
>
> A. No, sir, none whatever.

Q. When did that matter first come to be talked of?

A. Well, on the day of the sale the Garrett brothers came up—

Q. Garrett brothers?

A. Yes, sir.

Q. Both of them?

A. I think they were both there. I know this gentleman was there. That sale had been put off, postponed for several months, at the request of Mr. Garrett.

Mr. BRONSON: What is that, Mr. Latourette? I cannot hear what you say.

A. It had been postponed—the advertisement of the sale had been postponed because Mr. Garrett was figuring on organizing a company to take over that property, and it was understood that his brother—this gentleman here—was coming up from California, and we held the sale off until a time when this Mr. Garrett would be able to be here. And there was an understanding between the other Mr. Garrett and this one, too, when he came that morning, that we were to bid that property in, and that the Garretts, or they had connections they said, by which they could organize a company, and take that property over at what we had in it, or what the bank had in it, with the interest. That is all we wanted to get out of it—all we expected to get. And I think they were both there that morning, and Mr. Bron-

son, too, as I remember. But I don't think they stayed to the sale.

Q. They knew of the sale?

A. Oh, yes, they knew of the sale. And after the sale—now, the understanding was that they were to pay five thousand dollars down, and have terms on the balance. Shortly after the sale, the other Mr. Garrett who was residing in Portland came up and said that they were unable to raise five thousand dollars, and wanted to have the property turned over on the payment of two thousand dollars. And after some little talk, and I think consultation with my partner, I told him that we would be satisfied."

At this time the Pacific Machinery Company's President, Mr. Garrett, was in San Francisco and came up purposely to attend the sale, and was present in Oregon City at the time the bids were opened and made no objection to the course pursued by the Assignees. He says that he spoke to Latourette and to Plaintiff in Error about the claim of the Pacific Machinery Company, who asserted a claim to it, but this is denied. Whatever he said, however, if he said anything, it is manifest from the record that he did not say that the title remained in the Pacific Machinery Company, because up to September 28th, 1911,—five months afterwards—he did not know himself that he was going to claim such a right.

It would be difficult, indeed, to conceive of a case where the facts justified the application of the doctrine of laches, acquiescence, and estoppel more clearly than in this case. There were other creditors. This was a going concern. Its credit was a part of its capital. Its apparent ownership of property was the foundation of its credit. A large part of its property, perhaps the greater part of it, consisted of this machinery. The Defendant in Error delivered the machinery to the Oregon City Lumber & Manufacturing Company and permitted it to exercise such acts of ownership over it as to give to the public at large the idea that it did own it, and to use it with that understanding. It appears from the testimony of D. C. Latourette (page 113, Transcript) that the Bank's claim was $17,000.00. What the other indebtedness was does not appear. To permit the Defendant in Error to now take this property and all of it, under the circumstances, would be a travesty upon the law. To avoid just such a result the Oregon statute providing for the assignment for the benefit of creditors was passed: "No general assignment of property for the benefit of creditors shall be valid unless it be made for the benefit of *all* his creditors in proportion to the amount of their respective claims." Sec. 7540, Lord's Oregon Laws.

The Plaintiff in Error at the Assignees' sale was purchaser in good faith, without notice, and for value, and entitled to be protected. The testimony

in the case shows conclusively that neither Meyer nor the Assignees nor Mr. Latourette, the attorney for the Bank, ever heard of this claim of the Defendant in Error until after the sale by the Assignees. Mr. Latourette, in addition to his testimony quoted above, described a meeting which he had with Mr. Bronson, the attorney representing the Machinery Company, some time after the sale, as follows (page 126, Transcript):

> "A. Then Mr. Bronson said, 'If you don't do that'—of course there was some more talk—if you don't want that I won't give it, at that meeting—but Mr. Bronson said, 'Well, if you don't do that, we are going to make a claim for that machinery.' 'Why,' I says, 'what do you mean?' and he says, 'Conditional sale contract.' 'Well,' I says, 'where is your conditional sale contract?' 'Well,' he says 'we haven't got any in writing, but,' he says, 'we were to get one.' 'Well, now,' I says, 'this is a pretty time to speak about anything of that kind.' And I got up and I told him that we couldn't consent to giving him two years on the first installment, after they had agreed to pay five thousand dollars down, and then I had come down to two thousand dollars.
>
> Q. Is that the first time that you ever heard of this conditional sale?
>
> A. That is the first time that I ever heard of it, yes."

Meyer, Plaintiff in Error (page 115, Transcript), says, speaking of the time of the sale and purchase by him:

> "Q. Up to that time, Mr. Meyer, I will ask you if you were informed by anyone, or had any knowledge that the Pacific Machinery Company claimed title to that property, or any part of it?
>
> A. I did not know of any."

Mr. J. J. Cooke, one of the Assignees, testifies (page 118, Transcript):

> "Q. At the time of the sale, or up to that time, had anybody told you that the Pacific Machinery Company, or any one claimed title to any of that property?
>
> A. No, sir.
>
> Q. Outside of the Lumber Company?
>
> A. No, sir.
>
> Q. No such claim was made before the Assignees?
>
> A. No, sir."

There is another reason why Defendant in Error must fail here. By Section 7414, Lord's Oregon Laws, it is provided:

> "All conditional sales of personal property or leases thereof containing a conditional right to purchase, where the property is thereafter so attached to any real estate as to become a

fixture thereto, shall be void as to any purchaser or mortgagee of such real property unless within ten days after said personal property is placed in and becomes attached to said real property a memorandum of such sale, stating its terms and conditions, together with a brief description of said personal property so as to identify it and signed by the vendor and vendee, with a notice endorsed thereon or attached thereto signed by the vendor or his agent describing such real property, shall be filed in the county clerk's or county recorder's office of the county wherein such property and real estate is situated. And in case such memorandum is so filed as herein provided, the terms and conditions thereof shall be valid and binding on all parties and shall be notice to any purchaser, incumbrancer, or mortgagee of such real property of the right, title and interest of the vendor therein, and such property may be removed from said real estate by the vendor upon condition broken in said memorandum."

If the present contention of the Defendant in Error is correct this statute made it obligatory on it to file with the County Clerk of Clackamas County the memorandum of sale mentioned in the section *within ten days after said personal property was placed in and became attached to said real property.* And this was not done. Defendant in Error was not ignorant of this statute, or its terms and re-

quirements. On the contrary, the letter of Mr. Bronson, quoted above, and found on pages 67-68 of the Transcript of Record, shows conclusively that the company did know of it and recognized its binding effect. It will be claimed now, we assume, that this section of the statute, being the Act of 1909, filed in the office of the Secretary of State February 23, 1909, was not in force at the time of the signing of the agreement, April 29, 1909, because the Legislature of the State of Oregon did not adjourn till February 20th, 1909. But this is not correct. It is clear that the Defendant in Error kept furnishing these articles running along up to September, and that the main and principal part of them were furnished at the time the conditional bill of sale was tendered, July 23rd. The law was in force then and had been since May 20th.

We respectfully submit that upon this record the judgment of the lower Court should be reversed.

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